For the prosecution, this evidence undoubtedly would have caused the police at least to investigate whether another person was responsible for the crime. As noted above, the aid of Honduras would have illuminated the significance of the facts the police already knew concerning Osorto: that he was stopped at the crime scene, that his clothes were stained red, and that he offered inconsistent alibis. Report of Officer Christopher Mahoney, Dec. 10, 1997, at 2, J.A. 135. These facts, combined with an eyewitness identification of Sirena as the murderer and confirmation that Sirena/Osorto had fled to Honduras right after the crime, would have allowed the Commonwealth to conduct a far more informed and effective investigation of James Merry's murder, one that would have identified and pursued Osorto as a murder suspect.

Had the Commonwealth nonetheless proceeded to trial against Bustillo, notification of the Honduran consulate also would have dramatically improved the effectiveness of Bustillo's defense and the quality of the trial as a vehicle for establishing the truth. First, the prosecution would not have been able to cast real doubt on the existence of "this so called Sirena," effectively undermining the credibility of Bustillo's entire defense. J.A. 22. Second, Bustillo could have introduced the police reports placing Osorto near the murder scene with red stains on his clothing. Third, the testimony of Amilcar Amaya identifying Sirena as the murderer would have had far more weight if the jury had known both that Sirena is a real person and also that he was at the scene of the crime. Finally, Bustillo would have been able to introduce hard evidence that Sirena had fled to Honduras, confirming the testimony of Ulma Martinez that she saw him on her flight the day after Merry died. 3/18/98 Tr. at 167-168.

To be sure, there is evidence placing Bustillo at the scene of the crime. But this evidence, which even standing alone had grave weaknesses and which pales when placed beside the overwhelming evidence of Osorto's guilt, in no way undermines the harm that the Commonwealth's violation of the Vienna Convention caused to both the investigation and the trial of this case. The fact remains that crucial and powerful evidence that Osorto, not Bustillo, murdered Merry went undiscovered, unintroduced, and unconsidered during Bustillo's trial — all directly traceable to the failure to notify the Honduran consulate.

This case provides new and unfortunate confirmation of a proposition established by detailed studies of other wrongful convictions: the failure of defense counsel to discover exculpatory evidence is often a significant factor leading to such wrongful convictions. A study released earlier this year by the Innocence Commission for Virginia and coauthored by the Mid-Atlantic Innocence Project found that in three of the eleven wrongful convictions studied, important exculpatory evidence was not disclosed to defense counsel. INNOCENCE COMMISSION FOR VIRGINIA, A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA (2005), at 62, *available at* http://www.icva.us [hereinafter ICVA REPORT].[2] Defense counsel's failure to discover crucial

2. The ICVA Report corroborates the conclusion drawn by earlier scholars and researchers. *See, e.g.*, Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 tbl.6 (1987) (discussing suppression of exculpatory evidence as a cause of wrongful convictions); Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 62 (2002) (noting the "markedly high incidence"

(Cont'd)

exculpatory evidence can stem from a variety of causes. As the case now before the Court illustrates, one such cause can be that a foreign-national suspect is not made aware of his right to contact his consulate, and as a result, evidence that would have helped in the search for the truth is never located.

As the United States has conceded, Bustillo should have been notified of his right to contact the Honduran consulate.[3] Unfortunately, he was not. As a result of this violation, most likely an innocent man sits in prison, while James Merry's murderer walks free in Honduras. This case is an unsettling example of how the truth-finding function of the state courts can be severely impaired by the violation of a criminal defendant's right to consular notification.

The wrong in this case is not singular to Bustillo, although the damage to him is undeniable. The wrong in this case also is inflicted on the public as a whole: the entire process of the criminal justice system, from the police investigation to the performance of defense counsel to the

(Cont'd)

of suppression of exculpatory evidence in wrongful conviction cases examined); Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 312-313 (2001) (citing recent study showing that "convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence suggesting the defendants' innocence or presented evidence they knew to be false"); James S. Liebman & Jeffrey Fagan, *A Broken System: Error Rates in Capital Cases, 1973-1995*, at ii & app. C & D (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman (noting suppression of exculpatory evidence as a leading cause of wrongful convictions in capital cases and citing examples).

3. The United States has issued an apology to Honduras.

deliberation and determination of the jury at trial, was hobbled by the Commonwealth's failure simply to notify Bustillo of his right to contact the Honduran consulate as required under the Vienna Convention. This case is a perfect example of why the personal right to consular notification is essential to our criminal justice system's most vital purpose, the accurate determination of guilt and innocence.

II. CONSULAR NOTIFICATION AMELIORATES THE UNIQUE DISADVANTAGES FACED BY FOREIGN NATIONALS THAT CAN OTHERWISE INHIBIT THE SEARCH FOR TRUTH IN CRIMINAL INVESTIGATIONS AND PROSECUTIONS.

As this Court observed in *Herrera v. Collins*, "the central purpose of any system of criminal justice is to convict the guilty and free the innocent." 506 U.S. 390, 398 (1993). The fulfillment of this purpose requires the determination of the truth, which can be ascertained only through the discovery and consideration of relevant facts. In order both to ensure the freedom of innocent suspects and to uncover and punish those who commit crimes, the legal system must provide a reliable and comprehensive fact-finding process. Recognizing the existence of an individual right to consular notification under the Vienna Convention will further this process and thus serve the all-important purpose of the criminal justice system.

The Vienna Convention identifies protecting the interests of nationals abroad and assisting such nationals as two primary consular functions. Vienna Convention, arts. 5(a) & (e), 21 U.S.T. 77. The provisions of Article 36 — the Article that establishes the right of consular officers to visit, communicate with, and assist their detained national — are

intended to further these functions. *See id.* art. 36. Consular officers, however, cannot perform their functions if they are not aware of a national's detention. Thus, the parties to the Vienna Convention agreed that a detained foreign national must be granted the right to contact his consul. *Id.* art. 36(b). Moreover, because individuals are unlikely to be aware of this right, the parties agreed that a detained foreign national must be informed of his right to contact his consul. *Id.* In this fashion, Article 36(b) enables consular officers to fulfill the important functions that the international community agrees they should play.

In addition to the language of the Vienna Convention, the negotiating history of Article 36 of the Convention suggests that most parties to the treaty, including the United States, were concerned about preserving a foreign national's individual right to consular notification. A particularly illuminating incident occurred when the Government of Venezuela proposed an amendment to the Convention that would have eliminated the individual right of consular communication. Other nations strongly opposed this amendment, and it was withdrawn. *See Standt v. City of New York*, 153 F. Supp. 2d 417, 425-26 (S.D.N.Y. 2001). Moreover, the United States itself "proposed language to 'protect the rights of the national concerned.'" *Id.* at 426 (*quoting* 2 United Nations Conference on Consular Relations: Official Records, at 337, U.N. Doc. A/Conf. 2 5/6 (1963)).

The strong inference to be drawn from both the text and the negotiating history of these passages is that the parties to the Convention recognized the difficulties faced by nationals abroad, especially when they find themselves enmeshed in a criminal investigation or prosecution. The parties viewed it as a core consular function to help nationals abroad to

overcome these difficulties. Indeed, the United States Department of State recognizes that "[f]ew of our citizens need . . . assistance more than those who have been arrested in a foreign country or imprisoned in a foreign jail." U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 412 (2004), *available at* http://foia.state.gov/regs/search.asp.

Simply by virtue of their non-native status, foreign nationals often face unique disadvantages in criminal proceedings, including language barriers and increased vulnerability to intimidation and manipulation. Without the support network usually available to citizens, they may also find they have little ability to direct or assist in a factual investigation.

Consular officers serve as a "cultural bridge" for their nationals who are detained abroad, and as such they can help overcome the special obstacles faced by those foreign nationals. *See* William J. Aceves, *International Decision*, 92 AM. J. INT'L L. 87, 89 (1998) ("Consular access . . . provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system."). There are at least two ways in which consular notification can aid both the foreign national and the fact-finding process that will determine his innocence or guilt: (1) consular officers can mediate the often significant language and cultural gaps between a foreign national and law enforcement personnel; and (2) consular officers can aid in the fact-finding process by providing access to information and individuals that may be available only in the foreign national's country of origin or in the relevant community of foreign nationals living in the United States.

A. Communication Gaps: Cross-Cultural Communication Problems and False Confessions.

Although it is not clear from the record in this case that they played a role in Bustillo's conviction, difficulties inherent in cross-cultural communications often present a significant challenge to foreign nationals who are suspected of or indicted for criminal acts. Even if a foreign national has a strong command of English or has the assistance of a fluent translator, ingrained cultural norms can lead to misunderstandings between the foreign national and his counsel or the authorities. *See, e.g.*, Janet Bauer, *Speaking of Culture: Immigrants in the American Legal System*, *in* IMMIGRANTS IN COURTS 8, 16 (Joanne I. Moore ed., 1999) [hereinafter *Speaking of Culture*] ("The 'language' of culture includes an array of not only verbal but also nonverbal signals. These include contexts, relations, emotions, and gestures that convey norms, values, schemas, meanings, intentions, and credibility."); Diana Eades, *"I Don't Think the Lawyers Were Communicating with Me": Misunderstanding Cultural Differences in Communicative Style*, 52 EMORY L.J 1109, 1126 (2003) [hereinafter *Misunderstanding Cultural Differences*] ("Even when grammar and accent seem quite close, ways of communicating or pragmatics may contain considerable differences that significantly affect communication."); Joan B. Kessler, *Perspective: The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 64, 74 (1988) (noting that an American lawyer "may arrive at inaccurate assumptions about the meaning of a [foreign national] client's responses," and that "[t]he lawyer must be aware of the possibility of misinterpretation, and pursue the issues for clarification").

For example, avoidance of eye contact, silences, and pauses — which Americans typically interpret as signs of evasiveness and dishonesty — can convey quite different meanings depending on the speaker's cultural background. *See Speaking of Culture* at 10 (noting that in Laotian culture eye contact is a sign of anger); Juan-Vicente Palerm et al., *Mexican Immigrants in Courts*, *in* IMMIGRANTS IN COURTS 73, 92 ("[R]ural Mexicans believe it is rude . . . to look directly at a person of authority; thus they may avoid eye contact in a respectful gesture. . . ."); *Misunderstanding Cultural Differences*, at 1127-30 (discussing the use of silence and pauses in communicative patterns of various cultures). Consular officers, as a "cultural bridge," can help law enforcement officials, prosecutors, and defense attorneys avoid the misunderstandings common in intercultural communications.

Consular officers can also help to allay any concerns that a suspect or witnesses might have about speaking with an attorney. They can, for example, explain to the defendant that, even though his attorney may be provided by the state, the attorney's duty of loyalty is to the client. Consular officers can also explain to witnesses the role of defense counsel in the United States and discuss with these witnesses the importance of cooperating with the attorney. Alternatively, consular officers can themselves speak with potential witnesses and pass along any relevant information to defense counsel.

Consular intervention may also help to avoid another significant risk — namely, the risk of false confession. Although there was no false confession in this case, false confessions are a significant factor in many wrongful convictions. *See, e.g.*, ICVA REPORT, at 42-54. According to the ICVA Report, "today's interrogation methods are so

effective, so powerful, and so calculated to obtain incriminating admissions, that they sometimes influence innocent people to falsely admit to crimes in which they had no involvement." *Id.* at 42.

The dangerous consequences of false confessions are not limited to their use at trial, nor is their effect limited to the individual suspect. "[F]alse confessions have sidetracked the police from pursuing the real perpetrators, led police and prosecutors to resist reversing course once they have mistakenly concluded that the confessor is guilty, and caused courts to confirm convictions long after compelling evidence surfaces that the system has prosecuted the wrong person." *Id.* at 43.

Foreign-national suspects may be particularly susceptible to giving false confessions. This is due in part to the fact that cultural barriers may prevent foreign nationals from "understand[ing] the '[arresting] nation's customs, police policies, or criminal proceedings.'" Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT'L L. 565, 605 (1997) (*quoting* Brief for United Mexican States as Amicus Curiae Supporting Appellant at 9, *Ohio v. Loza*, 1997 WL 634348 (Ohio Ct. App.1997) (No. CA96-10-214)). A consular official can help reassure a foreign-national suspect within the United States that he need not, and should not, confess to a crime if he did not commit it.

B. Aid in the Fact-Finding Process.

As Bustillo's case powerfully illustrates, contact with a foreign national's home consulate can be a critical aid in the fact-finding process. Consular officers are able to procure evidence from the suspect's country of origin and are often better able to gain entree into the relevant community of foreign nationals who are living in the United States. *See, e.g.*, Brief of European Union and Members of the International Community as Amici Curiae Supporting Petitioner, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (stating that consular officers "may assist in locating witnesses or documentary evidence available in the Sending State[, which] may be critical in a determination of guilt . . ."); Brief of Foreign Sovereigns as Amici Curiae Supporting Petitioner, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928) (stating that consular officers can "help collect evidence for use at trial"). This evidence may include testimony or documentary evidence that sheds light on either the particular circumstances of the crime or the background of the criminal suspect.

Such evidence will not necessarily be exculpatory. Involvement of consular officers may lead to evidence that implicates the criminal suspect — perhaps, for example, by providing a motive for the criminal act or revealing that the suspect has a history of related crimes. Contact with consular officers is vital not because it will further the release of every foreign-national suspect but because it will facilitate and aid the truth-finding process so that judges and juries can make an accurate determination of innocence or guilt. In short, the intervention of consular officers, made possible by notification of the detained foreign national of his right to contact his consul, will improve the fact-finding process of the criminal justice system in the state courts, thus enhancing the likelihood that the truth will be discovered and justice will be done.

CONCLUSION

For these reasons, amici curiae the Mid-Atlantic Innocence Project and the National Latino Peace Officers Association respectfully urge this Court to reverse the decision of the Supreme Court of Virginia.

Respectfully submitted,

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MOISES SANCHEZ-LLAMAS,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

MARIO A. BUSTILLO,
Petitioner,

v.

GENE M. JOHNSON, Director,
Virginia Department of Corrections,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

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INTEREST OF THE *AMICI CURIAE* [*]

Amici are professors and scholars of law with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. This case raises important questions concerning the interpretation of treaties to which the United States is a party and the authority of an international tribunal to effect direct changes in a core area of U.S. domestic law, namely whether individuals can assert treaty violations in the course of a criminal prosecution and secure suppression of evidence and dismissal of such proceedings. Acceptance of the arguments put forward by petitioners would undermine the authority of the Executive Branch in interpreting the international obligations of the United States, disregard the authority of Congress to determine the conditions under which federal courts can enforce international law, and bring about an unprecedented and profound change in the relationship between international organizations and domestic lawmaking in the United States.

SUMMARY OF ARGUMENT

The Vienna Convention on Consular Relations does not require the United States to permit individuals to challenge treaty violations in domestic court, and there is no evidence that the President or the Senate intended such an outcome when they adhered to this treaty. The President's interpretation of the Vienna Convention warrants substantial deference from this Court. The President is in the best position to determine the impact of any particular inter-

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[*] In accordance with Supreme Court Rule 37.6, *Amici* affirm that no person or entity other than *Amici* and their counsel authored this brief in whole or in part, and that no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this *amicus curiae* brief are on file with the Clerk of the Court.

pretation on the foreign relations of the United States. In this case the President's interpretation is consistent with the text of the Convention, which does not specify the means of domestic enforcement, and the practice of other signatory states, not one of which has treated the Vienna Convention as authorizing private enforcement in domestic courts. A contrary interpretation would cast a pall on future treaty negotiations by the United States because it would increase the risk of unanticipated and potentially undesirable private interference with treaty enforcement.

Neither comity nor a policy of uniform treaty interpretation compels this Court to regard the Vienna Convention as creating a private right of enforcement. The International Court of Justice, the only tribunal that has reached such a conclusion, is not a national court but an international agency with clearly delimited authority. It lacks the characteristics of a domestic agency that invite judicial deference. Regarding it as an expert body deserving of special deference will deter the United States from joining future treaties that assign even limited responsibility to international agencies. Finally, a decision that the Vienna Convention authorizes private enforcement will disrupt rather than promote uniform treaty interpretation, as no other state has reached such a conclusion.

ARGUMENT

I. THE VIENNA CONVENTION DOES NOT CONFER ON INDIVIDUALS A JUDICIALLY ENFORCEABLE RIGHT TO CONSULAR NOTIFICATION AND ACCESS

This Court has long held that the decision of the United States to adhere to a treaty, made in conformity with Article II, § 2, cl. 2, does not automatically endow individuals with the right to seek judicial redress for treaty violations. Because treaties typically establish obligations between states, they do

not normally empower domestic courts to embark on their own enforcement regime. Courts are reluctant to infer that this power exists absent clear evidence that the Executive and the Senate intended such a result. In the case of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (Vienna Convention), there is no evidence indicating that the Executive and the Senate expected courts in the United States to adjudicate private claims based on that treaty.

A. The Question of Whether a Treaty Creates a Judicially Enforceable Right Is Analytically Distinct From the Issue of Whether a Treaty is Self-Executing

This Court long has recognized that the questions of whether a treaty is self-executing and whether it allows individuals to seek judicial redress for its violation are analytically distinct questions. To say that a treaty is self-executing means only that no further legislative enactment is necessary for the treaty to have legal effect in the United States. In the case of the Vienna Convention, for example, the treaty is self-executing in the sense that police officials became obligated to inform persons under detention of the possibility of consular notification without further actions by Congress. To say that a treaty has *some* legal effect, however, does not mean that every person with an interest in the treaty's enforcement necessarily has the power to seek judicial relief for a violation. Rather, the courts of the United States must determine who has the authority to enforce a treaty and what remedies may be sought in light of what the treaty text expressly requires and what the Executive and the Senate intended in adhering to the instrument, interpreted against the general background practice of the political branches and the judiciary with regard to treaty enforcement.

At a minimum, a treaty should not be read as empowering private persons to obtain domestic judicial enforcement in circumstances where a domestic statutory enactment would not be interpreted as authorizing a private suit. As this Court has held on numerous occasions, a statute can have legal effect and still not delegate enforcement power to individuals. *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. ___ (2005); *Gonzaga University v. Doe*, 536 U.S. 273 (2002); *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *cf. Cannon v. University of Chicago*, 441 U.S. 671, 730 (1979) (Powell, J., dissenting).

Some of these cases involve the doctrine of implied private rights of actions, while others deal with the scope of specific legislation, particularly 42 U.S.C. § 1983. What they have in common, and what makes them relevant to the issue of treaty interpretation, is their recognition that legislative choices about enforcement mechanisms represent significant policy determinations that should not be preempted by the judiciary. The manifest capacity of Congress to provide expressly for private enforcement of its enactments often has persuaded this Court that it should not attempt to create an additional enforcement mechanism when Congress has not asked it to do so. The same logic applies to treaty interpretation.

Petitioners, in effect, seek a rule that would create a strong presumption in favor of implying judicial enforcement of treaties on behalf of private persons. The Brief for *Amici*